

The Honorable John C. Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SHANNON MACK and LINDSEY
FARROW, individually and on behalf of all
others similarly situated,

Plaintiffs,

v.

AMAZON.COM, INC.,

Defendant.

CASE NO. 2:22-cv-01310-JCC

**AGREEMENT REGARDING
DISCOVERY OF
ELECTRONICALLY
STORED INFORMATION
AND [~~PROPOSED~~] ORDER**

The parties hereby stipulate to the following provisions regarding the discovery of electronically stored information (“ESI”) in this matter:

A. General Principles

1. An attorney’s zealous representation of a client is not compromised by conducting discovery in a cooperative manner. The failure of counsel or the parties to litigation to cooperate in facilitating and reasonably limiting discovery requests and responses raises litigation costs and contributes to the risk of sanctions.

2. As provided in LCR 26(f), the proportionality standard set forth in Fed. R. Civ. P. 26(b)(1) must be applied in each case when formulating a discovery plan. To further the application of the proportionality standard in discovery, requests for production of ESI and related

1 responses should be reasonably targeted, clear, and as specific as possible. This agreement is
2 intended to assist the parties in identifying relevant, responsive information that has been stored
3 electronically and is proportional to the needs of the case. The agreement does not supplant the
4 parties' obligations to comply with Fed. R. Civ. P. 34.

5 **B. ESI Disclosures**

6 Within 45 days of entry of this Order, or at a later time if agreed to by the parties, each
7 party shall disclose:

8 1. Custodians. The custodians most likely to have discoverable ESI in their
9 possession, custody, or control. The custodians shall be identified by name, title, connection to
10 the instant litigation, and the type of the information under the custodian's control.

11 2. Non-custodial Data Sources. A list of non-custodial data sources (*e.g.*, shared
12 drives, servers), if any, likely to contain discoverable ESI.

13 3. Third-Party Data Sources. A list of third-party data sources, if any, likely to
14 contain discoverable ESI (*e.g.*, third-party email providers, mobile device providers, cloud
15 storage) and, for each such source, the extent to which a party is (or is not) able to preserve
16 information stored in the third-party data source.

17 4. Inaccessible Data. A list of data sources, if any, likely to contain discoverable ESI
18 (by type, date, custodian, electronic system or other criteria sufficient to specifically identify the
19 data source) that a party asserts is not reasonably accessible under Fed. R. Civ. P. 26(b)(2)(B).

20 5. Foreign data privacy laws. Nothing in this Order is intended to prevent either party
21 from complying with the requirements of a foreign country's data privacy laws, *e.g.*, the European
22 Union's General Data Protection Regulation (GDPR) (EU) 2016/679. The parties agree to meet

1 and confer before including custodians or data sources subject to such laws in any ESI or other
2 discovery request.

3 **C. ESI Discovery Procedures**

4 1. On-site inspection of electronic media. Such an inspection shall not be required
5 absent a demonstration by the requesting party of specific need and good cause or by agreement
6 of the parties.

7 2. Search methodology. The parties shall timely confer to attempt to reach agreement
8 on appropriate search terms and queries, file type and date restrictions, data sources (including
9 custodians), and other appropriate computer- or technology-aided methodologies, before any
10 searches are undertaken. The parties shall continue to cooperate in revising the appropriateness of
11 the search methodology.

12 a. Prior to running searches:

13 i. The producing party shall disclose the data sources (including
14 custodians), any search terms and queries, any file type and date restrictions, and any other
15 methodology that it proposes to use to locate ESI likely to contain responsive and discoverable
16 information. The producing party may provide unique hit counts for each search query.

17 ii. After disclosure, the parties will engage in a meet and confer
18 process regarding the producing party's proposed search methodology (including, if relevant, any
19 additional search terms sought by the non-producing party).

20 iii. The following provisions apply to any search terms / queries
21 proposed by the requesting party. Focused terms and queries should be employed; broad terms
22 or queries, such as product and company names, generally should be avoided. A conjunctive
23 combination of multiple words or phrases (*e.g.*, "computer" and "system") narrows the search
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1 and shall count as a single search term. A disjunctive combination of multiple words or phrases
2 (e.g., “computer” or “system”) broadens the search, and thus each word or phrase shall count as
3 a separate search term unless they are variants of the same word. The producing party may
4 identify each search term or query returning overbroad results demonstrating the overbroad
5 results and a counter proposal correcting the overbroad search or query. If the producing party
6 contends that a search term or query is overbroad, the producing party shall provide hit counts
7 and reasonable examples of the asserted categories of irrelevant or overbroad documents hits.

8 b. The mere fact that a document is hit or captured by the application of any
9 agreed upon search terms or search methodology does not mean that such document is necessarily
10 responsive to any propounded discovery request or is otherwise relevant to this
11 litigation. Determinations of discoverability, responsiveness, and privilege shall be made by the
12 producing party.

13 c. The Parties agree that nothing in this Agreement and Order prevents the
14 Parties from using computer assisted review (“CAR”) or technology assisted review (“TAR”),
15 including continuous active learning, or other e-discovery tools or techniques to identify ESI
16 likely to contain discoverable information insofar as their use merely prioritizes or sorts
17 documents for human review. The Parties do not need to disclose the use of CAR or TAR solely
18 for the purposes of sorting or prioritizing Documents for human review. But if the use of such
19 technologies excludes documents from human review, that would otherwise be reviewed under
20 the agreed search methodology, their use must be disclosed.

21 d. Agreement on a search methodology does not foreclose either party from
22 requesting follow-up discovery on specific documents or specific categories of documents that
23 are responsive but that would not have been captured by the applied search methodology.

1 Notwithstanding the foregoing, however, the Parties will make every effort to avoid the need for
2 serial ESI searches.

3 3. Format.

4 a. ESI will be produced to the requesting party with searchable text, in a
5 format to be decided between the parties. Acceptable formats include, but are not limited to, native
6 files, single-page TIFFs (only with load files for e-discovery software that includes metadata
7 fields identifying natural document breaks and also includes companion OCR and/or extracted
8 text files), and searchable PDF.

9 b. Unless otherwise agreed to by the parties, files that are not easily converted
10 to image format, such as spreadsheet, database, and drawing files, will be produced in native
11 format. To the extent possible, if PowerPoint files are converted to image or PDF format, each
12 slide will be one full page, such that all text is legible.

13 c. Each document image file shall be named with a unique number (Bates
14 Number). File names should not be more than twenty characters long or contain spaces. When a
15 text-searchable image file is produced, the producing party must preserve the integrity of the
16 underlying ESI, *i.e.*, the original formatting, the metadata (as noted below) and, where applicable,
17 the revision history.

18 d. If a document is more than one page, the unitization of the document and
19 any attachments and/or affixed notes shall be maintained as they existed in the original document.

20 e. The parties may produce their documents in the following format: single-
21 page images and associated multi-page text files containing extracted text or with appropriate
22 software load files. Each producing party will undertake reasonable efforts to produce load files
23 containing all information required by the litigation support system used by the receiving party.

1 The parties will further discuss the format of any document production prior to making such
2 production, and confer in good faith about alternative production formats optimized for each
3 party's respective litigation support system.

4 f. The full text of each electronic document shall be extracted ("Extracted
5 Text") and produced in a text file. The Extracted Text shall be provided in searchable ASCII text
6 format or UTF-8 text format (or Unicode text format if the text is in a foreign language) and shall
7 be named with a unique Bates Number (*e.g.*, the unique Bates Number of the first page of the
8 corresponding production version of the document followed by its file extension).

9 x. To the extent possible, documents will be produced in the color and quality
10 they are maintained in the ordinary course of business.

11 4. De-duplication. The parties may de-duplicate their ESI production across custodial
12 and non-custodial data sources after disclosure to the requesting party, and the duplicate custodian
13 information removed during the de-duplication process tracked in a duplicate/other custodian
14 field in the database load file.

15 5. Email Threading. The parties may use analytics technology to identify email
16 threads and need only produce the unique most inclusive copy and related family members and
17 may exclude lesser inclusive copies. Upon reasonable request, the producing party will produce
18 a less inclusive copy.

19 6. Metadata fields. If the requesting party seeks metadata, the parties agree that only
20 the following metadata fields need be produced, and only to the extent it is reasonably accessible
21 and non-privileged: document type; custodian and duplicate custodians (or storage location if no
22 custodian); author/from; recipient/to, cc and bcc; title/subject; email subject; file name; file size;
23 file extension; original file path; date and time created, sent, modified and/or received; protective
24

1 order designation; and hash value. The list of metadata type is intended to be flexible and may be
2 changed by agreement of the parties, particularly in light of advances and changes in technology,
3 vendor, and business practices.

4 **D. Preservation of ESI**

5 The parties acknowledge that they have a common law obligation, as expressed in Fed. R.
6 Civ. P. 37(e), to take reasonable and proportional steps to preserve discoverable information in
7 the party's possession, custody, or control. With respect to preservation of ESI, the parties agree
8 as follows:

9 1. Absent a showing of good cause by the requesting party, the parties shall not be
10 required to modify the procedures used by them in the ordinary course of business to back-up and
11 archive data; provided, however, that the parties shall preserve all discoverable ESI in their
12 possession, custody, or control.

13 2. The parties will supplement their disclosures in accordance with Fed. R. Civ. P.
14 26(e) with discoverable ESI responsive to a particular discovery request or mandatory disclosure
15 where that data is created after a disclosure or response is made (unless excluded under Sections
16 (D)(3) or (E)(1)-(2)).

17 3. Absent a showing of good cause by the requesting party, the following categories
18 of ESI need not be preserved:

- 19 a. Deleted, slack, fragmented, or other data only accessible by forensics.
- 20 b. Random access memory (RAM), temporary files, or other ephemeral data
21 that are difficult to preserve without disabling the operating system.
- 22 c. On-line access data such as temporary internet files, history, cache,
23 cookies, and the like.
- 24 d. Data in metadata fields that are frequently updated automatically, such as
last-opened dates (see also Section (E)(5)).

- e. Back-up data that are duplicative of data that are more accessible elsewhere.
- f. Server, system or network logs.
- g. Data remaining from systems no longer in use that is unintelligible on the systems in use.
- h. Electronic data (*e.g.*, email, calendars, contact data, and notes) sent to or from mobile devices (*e.g.*, iPhone, iPad, Android devices), provided that a copy of all such electronic data is automatically saved in real time elsewhere (such as on a server, laptop, desktop computer, or “cloud” storage).

E. Privilege

1. A producing party shall create a privilege log of all documents fully withheld from production on the basis of a privilege or protection, unless otherwise agreed or excepted by this Agreement and Order. Privilege logs shall include a unique identification number for each document and the basis for the claim (attorney-client privileged or work-product protection). For ESI, the privilege log may be generated using available metadata, including author/recipient or to/from/cc/bcc names; the subject matter or title; and date created. Should the available metadata provide insufficient information for the purpose of evaluating the privilege claim asserted, the producing party shall include such additional information as required by the Federal Rules of Civil Procedure. Privilege logs will be produced to all other parties no later than 15 days after the substantial completion of written discovery, unless an earlier deadline is agreed to by the parties.

2. Redactions need not be logged so long as the basis for the redaction is clear on the redacted document.

3. With respect to privileged or work-product information generated either as part of litigation counsel’s pre-filing investigation into the named plaintiffs’ claims, or after the filing of the complaint, parties are not required to include any such information in privilege logs.

[Signatures on Following Page]

1 DATED: June 5, 2023

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3
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Attorneys for Defendant

ORDER

Based on the foregoing, IT IS SO ORDERED.

DATED this 6th day of June 2023.

A handwritten signature in black ink, reading "John C. Coughenour", written over a horizontal line.

John C. Coughenour
UNITED STATES DISTRICT JUDGE